No. [redacted] 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

FEDERAL TRADE COMMISSION, PETITIONER

v.

MARY CARTER PAINT CO., JOHN C. MILLER, I. G. DAVIS, JR., AND ROBERT VAN WORP, JR.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinion of the Court of Appeals (App. A to petition, 16-29) is reported at 333 F.2d 654. The opinion of the Federal Trade Commission (R. 55-91)* is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 19, 1964 (App. B, 30-31). On September 17, 1964, Mr. Justice Black extended the time for filing

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*"R." refers to the printed record in the Court of Appeals, "Tr." to the stenographic transcript of the hearing before the hearing examiner, "CX" to Commission exhibits and "RX" to respondent's exhibits. References to pages in the petition will be cited as "Pet. ...." and references to pages in the appendix to the petition will be cited as "App. ....."

a petition for a writ of certiorari to and including October 15, 1964, and on October 14, 1964, he further extended the time for filing to and including October 26, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Statute Involved

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
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> * * * * *
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Question Presented

Whether the Court of Appeals was warranted in holding, upon undisputed facts, that a case of deceptive and misleading advertising had not been established, and that, therefore, the Commission was not justified in issuing a cease and desist order.

Statement

As stated in the petition for a writ (Pet. 3), the essential facts are undisputed. The facts are here

stated as the opinion of the Court of Appeals stated them (App. A 17-18):

"Mary Carter Paint Co. is engaged in the business of manufacturing, selling, and distributing paint under the trade name of 'Mary Carter.' At the time of the hearings, the company distributed its paints in more than 27 states of the United States through over 500 retail outlets, including both company stores and franchise dealers. Although still a small company in the paint industry (its share of national paint sales is under one percent), the company has increased its sales from one million dollars in 1955 to twelve million dollars in 1960, a growth achieved by increasing the number of retail outlets and building the repeat business of satisfied customers.

"The basic business policy of Mary Carter, consistently followed over the past ten years, has been to manufacture and sell paint of high quality at a net cost to the consumer of half the amount he would pay for paint of comparable quality manufactured by leading national brand companies. This policy of giving 'double value' is carried out in a merchandising practice of pricing a can of Mary Carter paint at a price comparable to the price of national brand paints of comparable quality, and advertising and giving the purchaser a second can free. Thus, typical Mary Carter advertising in newspapers, magazines, radio, television, store signs, lithographed can tops, and truck sides, states: 'Buy One, Get One Free'; 'Every Second Can Free of Extra Cost'; 'Every Second Can Free'.

"Mary Carter's merchandising policy and the reason for it are specifically stated in advertisements

which explain that Mary Carter paint is 'quality priced' and that the company will not 'second rate' its paint with a low-price tag—a point of particular importance in a market in which the leading paint manufacturers have combined in a sustained publicity campaign to inculcate a public psychology equating quality with price.

"The quality of Mary Carter paint is not questioned. Indeed, at the hearing, Commission counsel contended that the quality of Mary Carter paint was not an issue, and the hearing examiner ruled that the evidence offered on the subject by Mary Carter was immaterial. The Commission has upheld that ruling. The evidence was taken for reporting, however, and both the evidence and the examiner's report of the evidence establish that Mary Carter paints are as good as, or superior to, paints marketed under leading national brand names at prices comparable to the single can price of Mary Carter paints.

"In accordance with Mary Carter's consistent merchandising practice, the single can price of its paint is the advertised price for a single can and the only price at which Mary Carter paint can be purchased, the purchaser being entitled to receive without extra cost a second can of the same kind of paint or of any other similarly or lower priced Mary Carter paint. Naturally, the purchaser will usually take the second can, but this is optional with him; at times he takes only the single can, and the price paid is the same single can price.

"There was no evidence, at the hearing, of consumer complaints or of any deception of Mary Carter cus-

tomers. The extent of consumer satisfaction with Mary Carter paints and with the value offered and given is indicated, however, by the company's increased sales and, particularly, its repeat-customer sales."

The complaint of the Commission charged that respondent's use of the word "free" in its advertising was "misleading and deceptive," in that "The second can of paint was not, and is not now, 'free', that is, was not, and is not now, given without cost to the retail purchaser since the purchaser paid the advertised price, which was, and is now, the usual and regular retail selling price for two cans of Mary Carter paint."

Respondent answered and maintained at the hearing, before the Commission, and before the Court, that its advertising was a fair and realistic representation of the bargain which it gave and that its use of the word "free" in its advertising was sanctioned by the Commission's decisions in *Matter of Walter J. Black, Inc.*, 50 F. T. C. 225 (1953) and *Matter of Book-of-the-Month Club*, 50 F. T. C. 778 (1953), and the Commission's "Free Rule" as stated in its Guides Against Deceptive Pricing.

While for a time prior to 1953, the Commission took the position that the word "free" in advertising could not be used unless the free item was given away by the advertiser as a "gift or gratuity" without requiring the purchase of any article or attaching any other condition (*Matter of The Book-of-the-Month Club*, 48 F. T. C. 1297 (1952)), the Commission in 1953 acknowledged that its prior ruling was essentially un-

realistic.* Then, in recognition of the fact that consumers are fully aware of the economics of offers of a "free" article upon the purchase of an article, and that businessmen the country over had been so using the word "free" in their merchandising and advertising for over a hundred years and were entitled to certainty in their knowledge of its propriety, the rule was laid down by the Commission that a second article may be advertised as "free," although the purchase of an article is required in order to get the second article free, provided the price of the first article is the ordinary and usual price of such merchandise and the price is not increased or the quality or quantity reduced as a predicate of offering the second article "free." (*In the Matter of Walter J. Black, Inc.*, 50 F. T. C. 225)**

In giving its rationale for overruling the *Book-of-the-Month Club* decision, the Commission in the *Black* case quoted with approval from a brief which had been filed in behalf of the Commission in the Supreme Court in *FTC* v. *Standard Education Society*, 302 U. S. 112 (1937), and adopted its language as the reasoning of the Commission (50 F. T. C. at 234):

> "It is true that the cost of the premium is borne by the manufacturer or seller, and that this

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* The Commission had reasoned in the *Book-of-the-Month Club* case (where "one free volume" was offered with each two volumes purchased) that if the consumer could obtain the free item only upon the condition of purchasing some other article, the item was not literally "free" in accordance with the "definite and absolute meaning" of that word, because the purchase price paid by the consumer for the one article included the cost of the "free" item.

** Black in his "Detective Book Club" offered a volume "Free" with a membership obliging a member to buy four volumes in twelve months.

cost must eventually be recovered in the price of the product sold if the business is to operate at a profit. But if the regular price of the article sold without the premium is the same as the price with the premium the premium does not cost the customer anything. It is FREE TO HIM regardless of whether or not it is ultimately included in the purchase price, and he does not care whether the manufacturer or dealer makes sufficient profit on the sale to cover the cost of the premium, whether the cost is termed as an advertising expense, or whether it causes the manufacturer or dealer to operate at a loss."

The holding of the *Black* decision, followed by a like revision of the order previously entered in the *Book-of-the-Month Club* case (50 F. T. C. 778), was incorporated in the Commission's subsequently promulgated "Free Rule" (Dec. 3, 1953), which established rules governing the use of the word "free" where receipt of the free item was conditioned upon the purchase of another item (R. 59).*

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* The Commission's "Free Rule" at the time of the complaint and decision of the Commission read as follows:

"In connection with the sale, offering for sale, or distribution of industry products, it is an unfair trade practice to use the word 'free,' or any other word or words of similar import, in advertisements or in other offers to the public, as descriptive of an article of merchandise, or service, which is not an unconditional gift, under the following circumstances:

"(1) When all the conditions, obligations, or other prerequisites to the receipt and retention of the 'free' article of merchandise or service offered are not clearly and conspicuously set forth at the outset so as to leave no reasonable probability that the terms of the offer will be misunderstood; and, regardless of such disclosure:

"(2) When, with respect to any article of merchandise required to be purchased in order to obtain the 'free' article or

The initial decision of the hearing examiner against respondent in this case went primarily on the ground that Mary Carter's free offer did not meet the Commission's "Free Rule" requirement that the conditions for receipt of the free article be clearly and conspicuously stated (R. 33-39). That conclusion was reached although (a) no such claim had been made in the complaint or suggested at any time during the hearing, and (b) the advertising referred to in the complaint and

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service, the offerer (a) increases the ordinary and usual price of such article of merchandise, or (b) reduces its quality, or (c) reduces the quantity or size thereof."

As restated, effective January 8, 1964, the rule reads as follows:

"Frequently, advertisers choose to offer bargains in the form of additional merchandise to be given a customer on the condition that he purchase a particular article at a price usually offered by the advertiser. The forms which such offers may take are numerous and varied, yet all have essentially the same purpose and effect. Representative of the language frequently employed in such offers are 'Free,' 'Buy One—Get One Free,' '2-For-1 Sale,' 'Half Price Sale,' '1¢ Sale,' '50% Off,' etc. Literally, of course, the seller is not offering anything 'free' (i.e., an unconditional gift), or ½ free, or for only 1¢, when he makes such an offer, since the purchaser is required to purchase an article in order to receive the 'free' or '1¢' item. It is important, therefore, that where such a form of offer is used, care be taken not to mislead the customer.

"Where the seller, in making such an offer, increases his regular price of the article required to be bought, or decreases the quantity and quality of that article, or otherwise attaches strings (other than the basic condition that the article be purchased in order for the purchaser to be entitled to the 'free' or '1¢' additional merchandise) to the offer, the consumer may be deceived.

"Accordingly, whenever a 'free,' '2-for-1,' 'half price sale,' '1¢ sale,' '50% off' or similar type of offer is made, all terms and conditions of the offer should be made clear at the outset."

decision as "typical" concededly (in the examiner's own words) "leaves little doubt that payment must be made for the first can" (R. 34). The Commission necessarily rejected the examiner's principal ground of decision (R. 59-60).

The Commission did, however, accept the examiner's holding that Mary Carter's advertising was not permissible because the "free" second can of paint was not a "gift or gratuity," although the Commission felt obliged to state in its decision that it "did not thoroughly understand the hearing examiner's reasoning on this point" (R. 60-65).

At the hearing, the examiner excluded evidence proffered by Mary Carter to show that the quality of its paint was equal to or better than the quality of national brand paints similarly priced per single can. The evidence was excluded upon objection by counsel for the Commission that the quality of Mary Carter paint was not questioned and was not in issue (R. 127, 136). Under FTC Rules of Practice § 4.12(f), the hearing examiner received the evidence, however, for reporting purposes.* Commission counsel made no counter-offer

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* The evidence consisted of (a) testimonial and documentary evidence by Alfred Driscoll, a paint testing expert, detailing twenty different tests made under his direction of Mary Carter paints and five competitive brands of paint in five different categories (RX 7-10, 13, 14 for identification; R. 150-69; Tr. 186-237, 239-43); (b) testimonial and documentary evidence of production quality controls maintained and tests made of Mary Carter paint in the regular course of manufacture (RX 15-18, 20 for identification; R. 142-44, 173-79); (c) testimonial and documentary evidence of comprehensive comparative performance tests of Mary Carter paints and leading national brand paints by Mary Carter laboratory technicians (RX 19, 20 for

of proof but availed himself of the privilege of cross-examining the Mary Carter witnesses (R. 158-167, 196-198).

The examiner made findings for reporting purposes with respect to the excluded evidence. The substance of the findings made was that (in absence of evidence litigiously offered in opposition thereto) Mary Carter paint was shown to be "equal to or better than comparable, similarly-priced, top-quality national brand paints" (R. 47).*

The majority of the Commission found the present case "distinguishable" from the *Black* and second *Book-of-the-Month Club* cases in that, as stated, there was no "usual and customary price" established for a gallon or quart of Mary Carter paint because Mary Carter had always sold its paint on the basis of giving a second can to a purchaser who desired it upon the purchase of one can. "Consequently," said the ma-

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identification; R. 180-86); (d) testimony of the low percentage of consumer complaints concerning Mary Carter paints (R. 125-26, 179-80); (e) testimony of consumer acceptance of Mary Carter paints as demonstrated over the years by increased sales, repeat sales, and by an independent consumer preference survey (CX 55, 56, 59; RX 2 p. 6; RX 3 for identification; R. 120-23, 126-30, 143-44, 186, 194); (f) testimony concerning the qualification of Mary Carter paint for the Good Housekeeping Seal of Approval (RX 22 for identification; R. 191-94; (g) testimony concerning the qualification of Mary Carter paint for the American Hotel Association certificate of acceptability (RX 21 for identification; R. 186-90).

* Respondent excepted to the hearing examiner's exclusion of the evidence as to the comparable quality and price of paints. The Commission sustained the hearing examiner's ruling and respondent took its exception to the Court of Appeals.

jority, "even if the item required to be purchased, i.e., a single can of Mary Carter paint, had had a usual and regular price when the offer was first made, the price would eventually become the usual and regular price of two cans of paint" (R. 66). The majority also said the cases were "distinguishable" in that the merchandise required to be purchased in *Black* and *Book-of-the-Month Club* "was not always the same merchandise," that is, the offering was a "series of offers" involving different books at different prices, whereas Mary Carter's continuing offer was of a "combination of the same two articles" (R. 66). So, finally, the majority stated that the policy statement with respect to the use of the word "free" announced in the *Black* decision "is not applicable to respondents' advertising" since the cost of one can or two cans was the same, hence "the cost of the second can of paint was included in the price paid by the purchaser, and this second can, therefore, was not given as a gift or gratuity or free of charge to the purchaser" (R. 67).

Commissioner Elman, in dissent, said that the majority's holding that Mary Carter had not established a single can price for its paint "simply is not so" (R. 81). He noted that a single can price was fixed and that a can could not be bought for less, and that although the customer may and usually does take the second "free" can, whether he does or not the first can will still cost him the set price. "Thus, to paraphrase Black, the 'regular price' of Mary Carter paint 'sold without the premium is the same as the price with the premium.' The second can of paint 'does not cost the customer anything;' regardless of how it is paid for, it 'is Free To Him.' " (R. 84).

As to the majority reasoning that the second can could not be regarded as "free" because its cost was included in the price paid by the purchaser for the first can, Commissioner Elman said: "All this is perfectly obvious to all concerned here, as it also was in *Black* and *Book-of-the-Month Club*. And, unless those cases are now overruled, they permit use of the word 'free' in such circumstances" (R. 81).

Of the distinction which the majority drew between Mary Carter and *Book-of-the-Month Club,* Commissioner Elman observed that both cases involved a like "continuing offer over an indefinite period of time that can be acted on again and again by the same purchasers," and "The fact—deemed crucial by the Commission—that Mary Carter's paint remains the same while the Club's book titles change is obviously a distinction without a difference" (R. 84).

Commissioner Elman concluded that in any event the majority's "strained effort to 'distinguish' *Black* is much ado about nothing" because of the more crucial and fundamental failure to indicate how Mary Carter's offer would deceive. Of this, Commissioner Elman said (R. 88):

> "This brings me to what is perhaps the most serious deficiency in the majority opinion. The duty of the Commission in this case was to determine whether Mary Carter had violated Section 5 of the Federal Trade Commission Act by engaging in any 'unfair or deceptive acts or practices'. Yet nowhere does the Commission explain what was 'unfair or deceptive' about what Mary Carter did. The word 'deceptive' appears in the Commission's opinion on page 2 in a description of the allegations

of the complaint and again on page 10 in the observation that a good motive cannot justify a deceptive practice. But we are never informed as to who is, or might be, misled by Mary Carter's 'Buy 1 and get 1 Free' offer, or as to how that deception might be brought about."

The Court of Appeals agreed with Commissioner Elman, particularly that the Commission in this case had departed from its established rules on which Mary Carter "had every right to rely" and had reverted to its discarded reasoning in the first *Book-of-the-Month Club* case; that it had not done this forthrightly, however, but had purported to find this case "distinguishable" from *Black* when it was "indistinguishable;" and that the Commission decision had the "serious deficiency," pointed out by Commissioner Elman, that "nowhere does the Commission explain what was 'unfair or deceptive' about what Mary Carter did" (App. 21-23).

Judge Brown, concurring, noted that the "precise action" of Mary Carter was permitted by *Black* and the Commission's "Free Rule;" that Mary Carter's offer met "fully, honestly, and in good faith" the requirement of the "Free Rule;" and that with the Commission holding that Mary Carter may not do what the Commission's two pronouncements clearly permit, "Mary Carter is the victim of individualized discrimination" (App. 28).

Reasons for Denying the Writ

The Commission, phrasing its petition as presenting an "important question" calling for this Court's re-

view, poses the question as one of the "authority" of the Commission.

We submit that there is no question of Commission "authority" presented at all. The question is simply one of whether the decision of the Commission, that certain advertising was "deceptive and misleading," was soundly based on the undisputed facts.

The Commission neither raised below nor did the Court decide any question of Commission "authority." The case involved only the undisputed facts and the Commission's own rules and decisions. The Court of Appeals held that a finding of "deceptive and misleading" advertising was not warranted on the facts—indeed, the decision of the Commission had not even suggested who might be misled by the advertising or how he might be misled—and that the Commission's decisions in *Black* and *Book-of-the-Month Club* and its "Free Rule" sanctioned the Mary Carter advertising.

The concurring opinion of Judge Brown in the Court of Appeals points up even more clearly that there is no question in this case of the "authority" of the Commission. Judge Brown indicated that the Commission might have considerable latitude in the formulation of a "free rule," and he took the case on the basis of the Commission's own promulgation, and found that the decision of the Commission was "individualized discrimination" against respondent.

The case was of importance, in that it was important that such vagary on the part of the Commission be corrected; but the Court of Appeals having corrected it, nothing of importance remains, certainly no important

question of Commission authority, or any question warranting a review by this Court.

The petition suggests that the decision of the Court of Appeals "engenders considerable uncertainty in this important area of the Commission's work" (Pet. 6). On the contrary, the decision makes for certainty, as against what Commissioner Elman and the Court noted was the "uncertainty and confusion" introduced by the Commission's decision, "needlessly and unsettlingly, into an area of business activity where businessmen and the bar have long regarded the Commission's position as definite and clear" (R. 70; App. 21).

As also stated by Commissioner Elman (R. 90), and by the Court of Appeals (App. 22), respondent had "every right to rely" on the rulings which the Commission had made with respect to the use of the word "free" in advertising. "Individualized discrimination" against respondent is intolerable and called for the correction and return to certainty which the Court of Appeals decision provides in accordance with the Commission's own rules. The Commission should not have the ear of this Court in an attempt to gain a license to play fast and loose with its own rules and to practice individualized discrimination.

Although, as Commissioner Elman and the Court of Appeals noted, the Commission's decision gave no indication of wherein the alleged deception in respondent's advertising lay, the petition does undertake a specification—"It is the representation that $6.98 was the usual price for a gallon of paint that constitutes the unfair and deceptive practice" (Pet. 7).

The answer is that the representation, as the undisputed facts stated by the Court of Appeals show, is altogether true. As stated, "the single can price of its paint is the advertised price for a single can and the only price at which Mary Carter paint can be purchased. Naturally, the purchaser will usually take the second can, but this is optional with him; at times he takes only the single can, and the price paid is the same single can price" (App. 18).

Respondent went further even than the Commission in respect to the "representation" and "implication" of its advertising. Respondent forthrightly took the position that the buying public would be led to believe that the Mary Carter single can price was the standard value of that quality of paint according to the prices of leading brand paints of like quality. And respondent assumed the burden of proving that value and proved it abundantly, so that the hearing examiner reported that Mary Carter paint was shown to be "equal to or better than comparable, similarly-priced, top-quality national brand paints" (R. 47)*.

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* Respondent said in its brief in the Court of Appeals:

"Looked at from the public point of view, which is the touchstone, the Commission's approach and reasoning are all beside the point, a preoccupation with considerations which are of no interest to the public and have no bearing on any question of possible public deception. The prospective purchaser of paint wants to know the pertinent and important facts about the value he is receiving and is not in the least concerned with when the price was established or how long the value given has been going on. He is interested in comparative available values and the question in a case involving alleged deceptive advertising and unfair competition is solely one of whether the value represented is the

This fact meets and disposes of the argument in the petition around the "ordinary and usual price" and the "usual and customary retail price for the single article in the trade area" (Pet. 10-12). Mary Carter paints were shown, and found to be, priced on a single can basis at the usual and customary price for paint of that quality, both as to respondent's own single can price and as to the single can price of comparable paints of other leading paint manufacturers.

There could not be, therefore, and was not found to be, any violation of the Commission's "Free Rule" or pricing guides, for indisputably respondent had neither increased its usual price nor reduced the quantity of its article, and the Commission acknowledged that there was "no question" as to the clarity of the advertising to satisfy the Commission's rule in that respect (R. 59).

The petition removes any doubt that there might have been as to the Commission's intention with respect to the maintenance or modification of its ruling

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value given, that is, whether the purchaser is getting what he would be led to believe from the advertising.

"We do not quibble. We acknowledge, indeed assert, that the public would be led to believe and is entitled to believe from Mary Carter advertising that the price of a single can of Mary Carter paint is a market standard of value, the standard or customary retail price for paint of comparable quality, and that the second can free means that the purchaser is getting double value for his money. If that be the fact, as it was shown to be the fact in the evidence proffered and reported at the hearings, there is no possible basis for claiming that the public is deceived or that the Mary Carter advertising is in any way misleading."

in the *Black* and *Book-of-the-Month Club* cases. The Commission stands upon those cases (App. 14). Therefore, the Commission's attempt at distinguishing the present case from those cases becomes of crucial importance.* The distinction attempted in the petition fails just as Commissioner Elman and the Court of Appeals found it to fail.

The only difference between the cases is that one is books and the other is paint.

Black and *Book-of-the-Month* were both cases of a merchandising policy starting with, and continuing as, a regular practice of offering "free" books with the purchase of books. *Black* in his "Detective Book Club" offered "Free" a triplicate volume of novels with a membership obliging a member to take four such volumes in the next twelve months. *Book-of-the-Month* was a continuing offer of "Buy Two Books; Get One Free."

The petition's suggestions that the Commission's "Free Rule" and its decisions in *Black* and *Book-of-*

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* The petition's citation of *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, as in "accord" with the Commission's ruling in this case (Pet. 8), is amiss. That case bears no resemblance to the present case. The word "free" was there falsely used together with other false and fraudulent statements and practices "tied together as part of the same sales plan," including fictitious testimonials, false listings of contributors to the encyclopedia, false representations to prospective purchasers that "by reason of their prestige and influence they have been selected by the company to receive a set of books free of cost for advertising purposes," and false representations that "the regular price of the loose-leaf supplement alone was $69.50 and that the usual price of both books and loose-leaf supplements was much in excess of $69.50."

the-Month are not applicable to respondent's practice, because they were intended to apply only to "situations in which the newcomer offers a specific product that he has not sold before but others have sold" (Pet. 13), and are "addressed only to introductory offers by one breaking into the market" (Pet. 13), and apply only to "free" articles "given on some extraordinary occasion" (Pet. 14), are completely refuted by the fact that neither the decisions nor the rule state or suggest any such qualification or are consistent with any such interpretation.*

Neither *Black* nor *Book-of-the-Month* was a case of a product previously sold by others. The triple book volume sold by Black's Detective Book Club was distinctly its own compendium. Book-of-the-Month Club puts out current titles, but of its own edition, printing and binding. Neither "free" offer was "introductory," nor made for any limited period or "extraor-

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* It will be noted that the petition's suggested distinctions between *Black* and *Book-of-the-Month* on the one hand and Mary Carter on the other are somewhat different from the distinctions drawn in the opinion of the Commission in this case (*Supra*, pp. 10-11). They are also different from the distinctions drawn by counsel for the Commission in their brief before the Court of Appeals. Their counsel did not attempt to support the opinion of the Commission in this respect, but argued (1) the Commission was not estopped by its decisions in *Black* and *Book-of-the-Month*, and (2) the "Free Rule" was intended to apply "only when an item not ordinarily included is given with the purchase of another item at its usual and regular price"; it was not intended "to sanction the word 'free' in describing articles usually included in a combination." Of course, *Black* and *Book-of-the-Month* were combinations of the same articles, usually, regularly and continuously "included in a combination."

dinary occasion," but both were continuing offers as a regular business practice.

The *Black* and *Book-of-the-Month Club* cases are, as the Court of Appeals found, indistinguishable, in what the petition terms their "essential characteristic," from the Mary Carter case and that fact leaves nothing for this Court to review.

It remains only to respond to the suggestion of the petition (Pet. 13-14) that the Court of Appeals should not have dismissed the complaint, but should have remanded the case to the Commission "to hear the proffered testimony" of the value of Mary Carter paints on the basis of the usual and customary price of paints of like quality—testimony that was before the Commission but which the Commission refused to consider. What is necessarily meant by this suggestion, if it means anything, is that the Commission should be given another opportunity to offer counter-proof, for the only conclusion to be drawn from the proffered evidence was the one which the hearing examiner drew. There is nothing more to hear of the proffered testimony. As to any further hearing or consideration of any possible issue of the price and quality of Mary Carter paint as compared with leading brand paints, not only did the Commission deliberately reject its opportunity in this respect, but both in their brief and in response to inquiry from the bench on oral argument in the Court of Appeals counsel for the Commission expressed the disinterest of the Commission in any further consideration of the subject or in a remand of the case for that or any other purpose.

Conclusion

The petition for a writ of certiorari should be denied.

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